United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Signed

75-4149

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FRANCIS J. COSTELLO,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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STATEMENT OF THE ISSUE PRESENTED

Whether taxpayer's pacifist religious beliefs entitle him to exemption from the portion of his income tax liability proportionate to the part of the Government's tax revenue spent on defense.

STATEMENT OF THE CASE

Taxpayer[1/] appeals from a decision of the Tax Court entered on March 12, 1975, upholding the Commissioner's determination of a deficiency of $1,438 in his 1971 income taxes. (R. 31.)[2/] On March 12, 1975, Judge Theodore Tannenwald, Jr. entered the

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1/ In this brief, the appellant is referred to as taxpayer, and the appellee is referred to as the Commissioner.

2/ "R." references are to the separately bound record appendix filed by taxpayer.

memorandum opinion (unofficially reported at 34 T.C.M. 320) on which the decision is based. (R. 32-35.) A timely notice of appeal was filed on June 2, 1975. (R. 36.) This Court has jurisdiction under Section 7482 of the Internal Revenue Code of 1954.

On taxpayer's 1971 federal income tax return, he claimed a deduction of ten of the exemptions which Section 151 of the Internal Revenue Code of 1954 (26 U.S.C.) allows for dependents. Admittedly, he was entitled only to one exemption, but claimed ten to reduce the tax liability shown on the return. His purpose was to deny liability for taxes which would be used to support the Government's military activities. (R. 33-34.)

Taxpayer maintains that he is not liable for taxes so used because their payment would conflict with his religious beliefs and because he has a legal right to act in accordance with those beliefs. He asserts it is against his religious beliefs to participate in war-related activities and the payment of taxes used to finance the military constitutes participation in war activities. He also states he has a right under either the First Amendment of the Constitution or the Nuremberg Principles to refuse to pay taxes pursuant to his beliefs. (R. 3-5, 33-34.)

The Commissioner asserted a deficiency of $1,438 as to taxpayer's 1971 income taxes based on disallowing the part of the dependents exemption deduction attributable to the excess exemptions. Taxpayer petitioned the Tax Court for redetermination of the deficiency. The Tax Court sustained the Commissioner's determination, holding there is no legal basis for relieving

taxpayer from tax liability on account of his religious beliefs. (R. 3-5, 6, 34-35.)

ARGUMENT

TAXPAYER'S PACIFIST BELIEFS DO NOT ENTITLE HIM TO AN EXEMPTION FROM THE PORTION OF HIS INCOME TAX LIABILITY PROPORTIONATE TO THE PART OF THE GOVERNMENT'S TAX REVENUE SPENT ON DEFENSE

In this appeal, taxpayer contends he is entitled to an exemption from the portion of his 1971 income tax liability proportionate to the part of the Government's tax revenue spent on defense. He claims it is against his religious beliefs to participate directly or indirectly in warfare and payment of taxes used to finance the military constitutes participation in warfare. According to taxpayer, subjecting him to liability for the tax allocable to military spending violates his rights under the Free Exercise Clause of the First Amendment since it prevents him from following his religious beliefs concerning taxes and military spending. He also maintains he has a right to refuse to pay taxes used to finance illegal wars. He asserts the tax he seeks to avoid is related to an illegal war. (Br. 2-3, 8-9.)

Contentions such as taxpayer's have been oftentimes made in the courts and as many times rejected -- as they were in the proceedings below. E.g., Autenrieth v. Cullen, 418 F. 2d 586 (C.A. 9, 1969), cert. denied, 397 U.S. 1036 (1970); Russell v. Commissioner, 60 T.C. 942 (1973); Muste v. Commissioner, 35 T.C. 913 (1961).[3/] So they should be in this appeal, for there is

3/ See also Pietsch v. President of United States, 434 F. 2d 661 (C.A. 2, 1970), cert. denied, 403 U.S. 926 (1971); Kalish v. United States, 411 F. 2d 606 (C.A. 9, 1969); United States v. (continued)

no legal basis for excusing a taxpayer from tax liability because he objects to spending the tax revenue for military purposes. See Autenrieth v. Cullen, supra, pp. 588-589; Russell v. Commissioner, supra, pp. 945-946; Muste v. Commissioner, supra, pp. 918-920.

The determination of whether a governmental action violates a citizen's rights under the Free Exercise Clause of the First Amendment involves a balancing process, as rights under the clause are qualified rather than absolute. E.g., Sherbert v. Verner, 374 U.S. 398, 403 (1963). On the one hand, it has to be determined how deeply the action impinges on the citizen's religious practices. Linscott v. Millers Falls Co., 440 F. 2d 14, 17 (C.A. 1, 1971); see also Murdock v. Pennsylvania, 319 U.S. 105, 112-115 (1943).[4/] On the other, the importance of the public interest furthered by the action must be taken into account. Sherbert v. Verner, supra, pp. 406-408; Christian Echoes National Ministry, Inc. v. United States, 470 F. 2d 849, 856-857 (C.A. 10, 1972). Where the public interest outweighs the interest in allowing the citizen to practice his beliefs without restraint, there is no conflict

3/ (continued)
Haworth, 74-2 U.S.T.C., par. 9588 (S.D. N.Y., July 15, 1974); Leatherman v. Commissioner, 34 T.C.M. 270 (1975).

4/ In Murdock, supra, p. 113, the Court contrasted the license tax which it found to violate the Free Exercise Clause with income tax. As to income tax, the Court indicated there was no constitutional violation even though the tax is levied on the income of clergymen as it is on the income of other taxpayers.

with the Constitution. See Christian Echoes National Ministry, Inc. v. United States, supra, p. 857; Linscott v. Millers Falls Co., supra, pp. 17-18.

In the past, taxes have been found to place a heavy burden on a taxpayer's practice of his religious beliefs where they were lain directly on the religious practice as a precondition. E.g., Follet v. McCormick, 321 U.S. 573, 577 (1944); Murdock v. Pennsylvania, supra, pp. 110-113. Undue burdens have also been found where the action discriminated between the religious beliefs of the affected citizen and those of others. E.g., Sherbert v. Verner, supra, p. 406; Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953). As has often been said, the aim of the First Amendment religion clause is to make the Government a neutral party as to the different religious views of its citizens. E.g., Gillette v. United States, 401 U.S. 437, 449-454 (1971), rehearing denied, 403 U.S. 934 (1971); Abington School Dist. v. Schempp, 374 U.S. 203, 215-218 (1963). Governmental actions affecting religious practices have been held, however, not intolerably burdensome where they only indirectly affected the religious practices and applied equally to persons of all religious viewpoints. E.g., Linscott v. Millers Falls Co., supra; Hearde v. Commissioner, 421 F. 2d 846 (C.A. 9, 1970).

Here, the tax taxpayer objects to is lain on the public in general without correlation to any religious beliefs. Autenrieth v. Cullen, supra, p. 588; Russell v. Commissioner,

pp. 945-946. It is not intended to discourage taxpayer from engaging in any particular religious practice, even that of refusing to participate in warfare. Autenrieth v. Cullen, supra, p. 588; Russell v. Commissioner, supra, p. 946. And it does not discriminate between taxpayer and the followers of other religious viewpoints.[5/] In a word, measured against the criteria by which the gravity of infringements should be assessed, the imposition of liability for the full amount of the tax does not cast an unduly heavy burden on taxpayer's practice of his religious beliefs.

On the other side, the interest advanced by not allowing taxpayer an exemption from tax liability is substantial. If an exemption were granted, there would be no basis for not providing exemptions to other taxpayers who object on religious grounds to other uses of tax revenues. For example, exemptions might have to be granted on account of opposition to supporting education beyond the sixth grade, or assistance for the unemployed, or the construction of public power generating facilities, or the

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5/ Significantly, in this action, taxpayer is not out to have the Government adopt a neutral stance as between his religious beliefs and others. Rather, he seeks to have his religious beliefs favored with an exemption from taxes, which persons of different religious beliefs must pay. In all probability, providing him with the exemption would violate the First Amendment Establishment Clause. The exemption would amount to Government financial assistance given on account of taxpayer's beliefs in preference to the religious beliefs of others. Under the Establishment Clause, such assistance is forbidden. See, e.g., McCollum v. Board of Education, 333 U.S. 203 (1948).

exploration of space. See, e.g., Crowe v. Commissioner, 396 F. 2d 766 (C.A. 8, 1968). Granting exemptions from liability to all claiming to object for religious reasons to the Government's spending programs would make impossible the levying and collecting of taxes. Autenrieth v. Cullen, supra, p. 588; Russell v. Commissioner, supra, p. 947. Obviously, the public's interest in an orderly tax system, which could not be had if taxpayer's position were accepted, outweighs the interest advanced in allowing taxpayer the exemption he seeks. There is no violation of the Free Exercise Clause then in not granting taxpayer the exemption.

In addition, international agreements, including those implementing the Nuremberg Principles, impose no restriction on taxing citizens to finance military functions. This point was made clear by Judge Miller, now with the Sixth Circuit Court of Appeals, in Lerner v. Rountree, 149 F. Supp. 327, 330 (M.D. Tenn., 1956), aff'd per curiam, 252 F. 2d 490 (C.A. 6, 1958), as follows:

> In first place, the Court does not agree that there exists a principle of international law operating to relieve citizens from their tax obligations and liabilities under the local laws of their country, or imposing upon them individual responsibility for use made of tax revenue. No precedent for such a view has been cited and it finds no support in the language or purpose of any international engagement to which this country is a party. The Nuremberg Judgment was based upon altogether different facts and does not support the theories of immunity here advanced.
>
> Secondly, if the principle could be discovered, it could not be enforced so as to interfere with

> or impair the exclusive and non-delegable powers of the executive and legislative departments with respect to the foreign and military policies of the nation. The treaty-making power "[does not] extend so far as to authorize what the constitution forbids". 6/

Taxpayer therefore may not refuse to pay his taxes because the Government might use the revenue to finance a war, which he thinks is illegal.

In summary, the imposition of income tax liability on taxpayer and the expenditure of the tax revenue to support the military do not violate taxpayer's First Amendment rights. International agreements do not restrict the Government's authority to tax its citizens for the purpose of financing its military activities. And the Tax Court did not err in refusing to relieve taxpayer of the tax liability he objects to because of the use of the tax revenue to support the military.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be affirmed.

Respectfully submitted,

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OCTOBER, 1975.

6/ See also Pietsch v. President of United States, supra, p. 863; Kalish v. United States, supra, p. 601; Russell v. Commissioner, supra, p. 947.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on the appellant, appearing pro se, by mailing four copies thereof on this 17th day of October, 1975, in an envelope, with postage prepaid, properly addressed to him as follows:

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